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IN THE

# Supreme Court of the United States

Term, 1946.
No. 787

STELLA CHISHOLM, Administratrix of the Estate of HOWARD LLEWELLYN CHISHOLM, Deceased,
*Petitioner,*

vs.

READING COMPANY, a corporation,
*Respondent.*

## PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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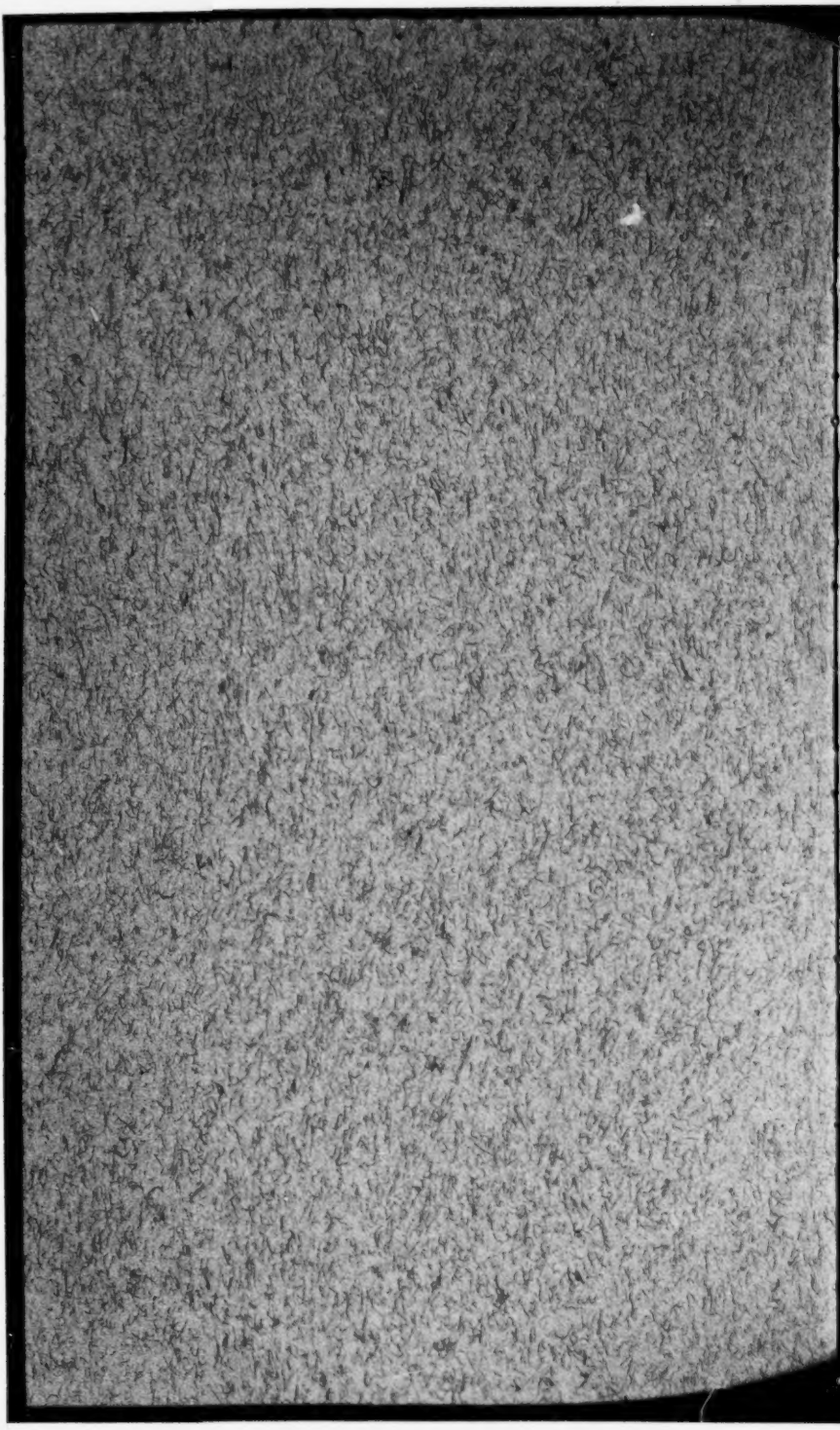

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**PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.**

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

STELLA CHISHOLM, Administratrix of the Estate of HOWARD LLEWELLYN CHISHOLM, Deceased, by her attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled case on November 13, 1946.

## OPINION BELOW.

There was no opinion in the United States District Court for the Eastern District of Pennsylvania.

The opinion of the United States Circuit Court of Appeals for the Third Circuit is not reported.

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## JURISDICTION.

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on November 13, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U.S.C.A., Sec. 347 (a).

## QUESTION PRESENTED.

Where decedent, employee of a railroad, was struck by a train while he was crossing tracks at usual time, in the performance of his duties, should not the issue of defendant's negligence have been submitted to the jury, in a suit under the Federal Employers' Liability Act, where the Trial Court conceded that it was a "very close case" and the record supported inferences and findings that defendant led the decedent reasonably to expect that the particular train would stop before reaching the point where he was crossing, but defendant's agents, although knowing the train would not stop and although having it within their power easily to warn decedent, failed to do so?

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.

The Seventh Amendment to the Constitution of the United States which, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

The Federal Employers' Liability Act, 45 U.S.C.A. 51, et seq. provides in part:

> "Every common carrier by railroad while engaging in commerce between any of the several States or territories * * * shall be liable in damages to any person suffering injury * * * resulting in whole or in part from the negligence of * * * such carrier * * *"

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## STATEMENT OF FACTS.

This was an action brought by STELLA CHISHOLM, administratrix of the estate of Howard Llewellyn Chisholm, deceased, under the Federal Employers' Liability Act (45 U.S.C.A. 51 et seq.) for damages suffered by reason of the

death of the said Howard Llewellyn Chisholm. The jurisdictional fact of interstate commerce was conceded by defendant. The Trial Court declined to let the case go to the jury and directed a verdict for the defendant. On appeal to the Circuit Court of Appeals (Third Circuit), the action of the Trial Court was affirmed Per Curiam.

Deceased was an employee of the Reading Railroad and was killed on February 2, 1944. The gist of plaintiff's case is that plaintiff's intestate was struck and killed by a train which he had been led to believe, by conduct of defendant railroad, would stop before reaching the point of actual impact. Evidence was introduced which, if accepted by the jury, supported the following conclusions, directly or by inference.

Deceased, formerly a school teacher (83a), was employed as a ticket agent at defendant's station in Lansdale (10a). At the station, two platforms, one for northbound traffic and one for southbound traffic, were separated by two sets of tracks. The east platform was for use by northbound passengers, and the west platform, for southbound passengers. The railroad maintains a ticket office only on the northbound side, and passengers desiring tickets for southbound travel are required to obtain them on that side and then to cross over to the southbound platform (10a). However, the railroad did maintain a waiting room on the southbound platform for use by southbound passengers (10a).

Decedent normally did most of his work at the ticket office on the northbound platform, but his duties required him regularly, in the early morning, to go to the southbound waiting room during the winter to maintain a fire in a stove for the comfort of passengers in the southbound waiting room (10a). A gate on a fence between the two sets of tracks permitted access from one side to another over a crossway maintained by the railroad for employees only (15a).

At a distance of 180 feet (79a) north of the northern end of the southbound platform, itself 360 feet long (77a), be-

gan a third set of tracks which was used as a siding for freight cars which were to be picked up by freight trains going through Lansdale. A public thoroughfare, known as Main Street, crosses the tracks almost immediately south of the platform (12a, 13a).

The testimony indicated that, in order to avoid blocking the street, trains invariably stopped north of Main Street (30a). Freight trains stopping to pick up freight cars from the siding must stop farther north in order to pull cars from the siding, which, as stated, was one hundred eighty feet above the northern end of the southbound platform (79a).

Inasmuch as cars on the siding are usually moved on the head end (40a), the train proceeding south must so stop that the car next to the engine will be at a point sufficiently north of the siding switch point to prevent fouling when the engine, having been detached, backs into the siding to pull the cars out of the siding, and, thereafter, back them on to the head-end of the train (40a).

This clearly establishes, therefore, that the southernmost point to which a southbound engine would proceed at Lansdale before stopping, when the intention was to pick up cars at this siding, would be 180 feet *north* of the northern *end* of the platform (siding's southern switch point).

On the afternoon of February 1, a message was left on the desk of the deceased, apprising him that certain freight cars were to be made ready on the siding for pick-up by a south-bound train (25a). In order for these cars to be removed, decedent had to prepare certain tickets and records (25a). There was, therefore, no doubt but that deceased knew under these circumstances that these cars were to be moved (26a). That means, of course, that he reasonably believed that a freight train was to *stop* and pick them up.

A freight train (known as C.D. 58), which had passed about 8:00 P.M., had failed to pick up fourteen of these cars (28a). When deceased came to work at 11:40 P.M., he had every reason to believe that the *next* southbound

freight train, "the first one down after midnight", would probably stop to pick up these cars (28a).

That *next* southbound freight train, known as the "Steel" train, normally reached Lansdale between four and five o'clock in the morning, as a regular rule (28a, 29a, 53a). However, on this particular occasion, the "Steel" train did not stop to pick up the cars, but continued to go through until it struck deceased (63a) who was presumably on his way from the southbound waiting room after attending to the heater in the waiting room on that side. (It appeared after the accident that the stove had actually been tended (36a).)

In point of fact, this same train did stop at Lansdale on the early morning before, February 1, to pick up cars (70a, 71a) and also stopped there the morning following the accident, February 3, to pick up these very cars (60a, 71a) which the decedent believed the train that struck him would stop to pick up.

Although the train dispatcher at the Reading Terminal in Philadelphia directs which of two trains will stop at Lansdale to pick up cars (46a) and can easily communicate that fact through a transmitter to the towerman or station agent at Lansdale (97a), no such notice was given in this case (50a). The "Steel" train which struck the decedent had its lights on, its bell ringing (62a), and was chugging noisily upgrade (64a) toward Lansdale. The deceased, therefore, must have been aware of its approach. Deceased, believing that this train would *stop* considerably north of the platform to pick up the cars on the southbound layoff track, undertook to cross from the west to the east side of the tracks at the employee crossing. The deceased concluded that this train would pick up these cars because he knew that the cars had been "topped off" on the southbound layoff. He knew that "C.D. 58", the only other train besides the "Steel" train which moves cars from Lansdale had already passed and had not moved the cars. He had tickets on his desk for these cars plus a written message

issued by the dispatcher at Reading Terminal, directing that the cars be placed on the layoff rather than in the yard, which fact in itself indicated imminent removal (41a, 12a).

He was not warned that this "Steel" train would not stop to pick them up, and it was conceded that usually no notice was given of which trains would not stop (48a). Thus employees engaged in that vicinity worked in the dark as to whether a particular train would pass through or stop. It was not the practice to allow cars to remain idle for any length of time, especially in wartime, and since the "Steel" train did frequently move such cars as these, decedent believed that this train would move them on this occasion, or a jury could have so found.

After the presentation of this evidence before the jury, defendant moved for a directed verdict on the ground that there was no evidence of negligence (108a). The Court, although conceding that the case was "very close" (109a), granted the motion (110a). The Circuit Court of Appeals affirmed Per Curiam. This petition for certiorari follows.

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## SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court erred:

1. In affirming judgment for the respondent.

2. In failing to hold that the Trial Court erred in directing a verdict for the defendant.

3. In failing to grant a new trial to plaintiff.

## REASONS FOR GRANTING OF WRIT.

1. Petitioner's Constitutional guarantee of trial by jury has been violated.

2. The decision of the United States Circuit Court of Appeals (3rd Cir.) is in direct conflict with the principle of decisions of this Court as expressed in Bailey v. Central Vt. Ry. Co., 319 U. S. 350, 63 S. Ct. 1062 (1943), and Lavender v. Kurn, 66 S. Ct. 740 (1946).

3. The Bailey and Lavender cases held that it was error for a Court to set aside a verdict given by a jury in favor of a plaintiff. The same principle should be reiterated as applicable to prevent trial courts from directing verdicts in favor of defendants where a factual basis from which the jury could find negligence has been established.

## CONCLUSION.

The writ should be granted.

Respectfully submitted,

STELLA CHISHOLM,
BY: JOHN H. HOFFMAN,
D. J. FARAGE,
RICHTER, LORD & FARAGE,
*Counsel for Petitioner.*

## BRIEF.

## ARGUMENT.

At common law, as well as under the Federal Employers' Liability Act, an employer owes to his employees a duty to use reasonable care to furnish his employees with a safe place to work. Bailey v. Central Vt. Ry. Co., 319 U. S. 350, 63 S. Ct. 1062 (1943).

Plaintiff submits that the failure of the defendant to warn decedent that the "Steel" train, which struck him, was not going to stop at Lansdale on the morning of February 2 constituted negligence, (a) of fellow servants, and (b) in that it rendered unsafe the place at which decedent was required to work, especially in the light of the following circumstances:

1. Decedent knew that freight cars were on the siding awaiting pick-up.

2. He had every reason to expect the *next* train, "the first one down after midnight" (28a), i. e. the "Steel" train, which struck him, to *stop* and pick them up, especially since the previous freight train had failed to do so.

3. Trains stopping at Lansdale regularly stopped *before* reaching Main Street in order to avoid blocking it (30a).

4. The siding for the freight cars began one hundred eighty feet *north* of the three hundred sixty-foot platform (77a), rendering it even more unlikely that a freight train, stopping to pick up cars, would come to the point where decedent was struck.

5. The train dispatcher, controlling movements of all trains, knew whether any given train would stop or not (41a), but failed to notify the towerman or the station agent (50a), although he had available facilities for conveying warning (97a).

6. Decedent went across the tracks and was struck at a crossing especially provided for him to use, and at the usual hour for checking the heater in the southbound waiting room. In other words, he was struck at a time when and place at which his presence should have been anticipated by defendant (15a).

While there was no direct evidence as to how the accident occurred, one of four explanations must account for the death.

1. *Deceased may not have heard or seen the train.* But, this hypothesis is ruled out by the facts. For it is uncontroverted that the bell on the train was ringing vigorously, and that the train was properly lighted. There were no other train movements or noises which might have muffled the ringing of the bell, and no other lights of similar intensity so as to lead a normal individual to mistake the source thereof or to be wholly oblivious thereto.

2. *Decedent may have heard the bell and seen the light, but may have made a foolhardy attempt to cross ahead of the train.* But this possibility is also rendered highly improbable by the facts. There was no motive or occasion for haste on decedent's part. And, even apart from the normal "presumption" that the decedent exercised due care (see Sweeting v. P.R.R., 142 F. 2d 611 (C.C.A. 3d 1945); Watkins v. Prudential Ins. Co., 315 Pa. 497 (1934), it would appear incomprehensible that any employee of such mentality as to be charged with the responsibilities entrusted

to the decedent as ticket agent, and formerly as a schoolteacher, would heedlessly and needlessly have exposed himself to the risk of impact from a fast approaching train, whose presence he had ascertained.

3. *Decedent may have chosen deliberately to commit suicide.* But, again, this possibility is completely ruled out by the evidence. There was complete absence of any evidence of motive for deliberate suicide. On the contrary, the circumstances, at the time, buttress the normal presumption of his interest in self-preservation. For, the evidence showed affirmatively that decedent, at the time of his death, was only forty-eight years of age, in perfect health, happily married and in a "jolly" mood the evening when he went to work (83a).

4. *The probabilities are that, although decedent heard the bell and saw the light, he implicitly believed that this, the "Steel" train, was going to stop north of the point at which he crossed, to pick up the already overdue, waiting southbound freight cars.* He had received explicit orders to prepare those cars for pick-up; he knew the cars were ready; he had every reason to expect the *next* train, this "Steel" train, to pick them up, especially since the previous freight train had failed to do so. Indeed, the train dispatcher's office had shown concern that these cars had not previously been picked up. The train dispatcher had made special note of the fact that southbound pick-up work had not been done yet, and issued orders to "topoff" the Lansdale cars if possible (87a, 93a). This order meant "to scout around immediately" to find power to move the cars (94a). Finally, decedent knew that even passenger trains regularly stopped north of Main Street to avoid blocking it, and that the siding for freight cars was considerably north of the platform.

Under the circumstances, a reasonable man would have supposed it safe to cross, despite the bell and light of the engine. It is a notorious fact that at night it is difficult to

judge the distance or speed of an engine, albeit its light may be burning and its bell ringing, particularly when, as here, the train is pulling upgrade. True, deceased probably heard the bell and saw the light of the train, *but the bell ringing and light were consistent with the train coming down only to the switching point and stopping there.* Bells and lights or no bells and lights, deceased still had every reason to suppose the train would stop above the point where he was crossing.

Defendant knew that decedent's duties required him to cross the tracks at this hour at the particular point which he actually used. That crossing was intended for his use. Defendant knew that decedent would reasonably expect the "Steel" train to stop to pick up the freight cars. The train dispatcher's office also knew that, despite earlier preparations for removal of the overdue freight cars, in point of fact, the "Steel" train would not stop. Yet, in the face of all these circumstances, which gave assurance that the train would stop, notice that in fact it would not stop was withheld from decedent.

The facts, thus viewed, point irresistibly to the conclusion that this tragedy resulted from the failure of the defendant, through its employees, to apprise decedent of this unexpected danger, to wit: that the "Steel" train would not stop *north* of the platform to pick up the freight cars waiting on the siding, despite decedent's reasonable expectations that it would stop. At least from the evidence it was for the jury *alone* to decide whether deceased was justified in so concluding. Even if one of the other possibilities, despite their improbability, were the fact, it still devolves on the jury to make that determination. Lavender v. Kurn, 66 S. Ct. 740 (1946).

It is submitted that this omission of warning, serving no utility except the avoidance of the possible momentary inconvenience involved in giving notice by telephone or telegraph, notice as easy to effect as the flick of a finger, constitutes a failure to use reasonable care to provide a safe

place to work. That place may be rendered unsafe as well by failure to give warning of dangerous conduct or activity as by inert or dormant defects inherent in the premises themselves. Compare Greenan v. Emerson Electric Mfg. Co., 191 S.W. 646 (Mo. S. Ct. 1946), and Bomba v. Borowicz, 38 N.Y.S. 2d 403 (1943), in both of which an injury by one servant to another was treated as establishing a master's liability on the theory of failure to furnish a reasonably safe place in which to work. To the same effect, see Griswold v. Gardner, 155 F. 2d 333; cert. den. 67 S. Ct. (1946).

Even as to known *trespassers* upon a limited area, a duty has been recognized on the part of the possessor of land to exercise reasonable care in the conduct of his *activities* (Restate., Torts, Sec. 336) as well as in the creation of dangerous *conditions* (Restate., Torts, Sec. 337). Compare Lowery v. Walker, House of Lords, L.R. 1910 (1911), Appeal Cases 10. *A fortiori,* at least a similar duty reposed in the defendant railroad to give to its *employee,* a *business guest,* whose duties required him to cross from one platform to the other, a warning that the "Steel" train on this occasion would not stop.

From Wynne, a hostile witness called by the plaintiff, defendant, by leading questions on cross-examination, attempted to prove that the practice on this railroad (without establishing it as a universal practice) was to have the dispatcher notify the ticket agent at Lansdale only when trains were to stop at Lansdale, but never when they were just passing through (46a, 48a).

But even assuming the truth of this statement, it does not follow that the *towerman* would not be informed whether a given train was to stop or not. Certainly, in every case, the towerman, whose duties required him to note the time of passage of every train and any such information he may have about each, must know about the advent of each train and a proposed move in regard to the area under his jurisdiction.

Furthermore, if it be true that the Reading Company had been indulging in a practice whereby it left to chance and guesswork, on the part of local employees, whether a train would or would not stop at Lansdale, then the Reading Company is clearly guilty of negligence.

Every employee is entitled to be reasonably informed of all the facts that present a possibility of harm to him. Particularly is this true here where other circumstances may reasonably lead the employee erroneously to undertake conduct which, as here, might lead him to death. The mere fact that the railroad may have been regularly so operated does not make such operation proper.

In Tiller v. Atlantic Coast Line, 318 U. S. 54, 323 U. S. 574, the evidence was that the train regularly backed up at night without a rear light,—moreover, that such movement was in accord with the universal railroad practice. The United States Supreme Court, however, held that the practice must be submitted to the jury, to be tested, in the light of reasonableness for propriety. Cf. Tennant v. Peoria & P. U. Ry., 321 U. S. 29, 64 S. Ct. 409.

So here, if the railroad never warned employees whether a given train, which sometimes stopped and sometimes did not stop, would stop, then we submit the railroad indulged in supine negligence and indifferently subjected the deceased to an unreasonable risk of harm, particularly in the light of other circumstances which might lead him to believe his conduct safe and proper. In point of fact, there was testimony (32a, 33a) from an employee of the defendant that an unsuccessful attempt had been made to reach the deceased by telephone. *Apparently, defendant's employees recognized the need for warning deceased, but the warning had been attempted too late, after Chisholm had left to look at the heater.*

With the advent of the Amendment of 1939 to the Employers' Liability Act, removing assumption of risk as a defense in Federal Employers' Liability cases, railroads may no longer be operated like roulette wheels, with the em-

ployees acting like players at a game of chance, uncertain whether the wheel will stop on the red or black, or on the "long shot", single or double "o". Today, the employee is entitled to know exactly what move will be made, where, when and how. At least it is for the jury to pass upon each practice.

In Labatt, Master and Servant, Sec. 1146, pages 3036-3039, it is said:

> "* * * a master is prima facia bound to instruct a servant as to all risks which are abnormal or extraordinary * * * (as where the risks) * * * were afterwards created by some material change in the intrinsic condition or relative arrangement of the instrumentalities by which the work was being done. * * * More particularly is a jury warranted in finding that the omission to warn was a culpable neglect of duty, where the servant was thrown off his guard by the assurance of the employer that there were no abnormal unsafe conditions."

Compare Miller v. Lehigh Valley R. R. Co., 41 Pa. Super. 625; Smith v. Delaware & Hudson R. Co., 227 App. Div. (N. Y.) 269; and Galveston H. & S. A. Ry. Co. v. Labit, 132 S. W. 102.

> "Where an employee is exposed to some unusual danger from the departure from the practice usually followed, a duty to warn may arise": Norton v. Whelock, 23 S. W. (2d) 142 (Mo.) cert. den. 50 S. Ct. 355.

The most that can be said of the deceased's conduct would be that the jury might have found him guilty of contributory negligence which would serve only to mitigate damages. The negligence of the defendant, however, in creating the situation is not minimized by the plaintiff's conduct.

All of these conclusions were properly questions of fact

that lie exclusively in the province of a jury for determination by it, and it alone.

The enormity of the risk, in point of fact, resulting in death, outweighed any possible utility in the omission to give warning. "Duty becomes more imperative as the risk increases." Bailey vs. Central Vt. Ry. Co., supra; Patton vs. Texas & P. Ry. Co., 179 U. S. 658, 664; 21 S. Ct. 275, 278 (1901).

Nor is it of moment that decedent's trips across the tracks were infrequent. Defendant, none the less, owed a duty to use reasonable care to provide a safe passageway by giving warning of dangers unexpected by the employee but known to defendant. As stated in Bailey v. Central Vt. Ry. Co., supra, p. 352, 1064:

> "That duty of the carrier (to use reasonable care to provide a safe place to work) is a 'continuing one' * * * *from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.*" (Emphasis ours.)

Apart from the theory that failure to give warning to an employee of unexpected dangerous activities constitutes a failure to provide a safe place to work, the same omission may be regarded as negligence of a fellow servant for which the employer is equally liable. See cases collected under Note 334, 45 U.S.C.A. 51. Under either theory, in view of the negligible character, if not total absence, of utility to justify the omission of warning, it would seem that the negligence of the defendant is beyond dispute.

But conceding, pro arguendo, that reasonable minds might differ as to whether that omission was negligence, the question is nevertheless one for the jury. Petitioner, the decedent's widow, predicates her right to submit the question of negligence to the jury upon the Bailey v. Central Vermont R. R. and Lavender v. Kurn cases. It is true that in both of those cases the Supreme Court held that it

was improper for the lower court to set aside a verdict found by a jury, whereas in this case the issue of negligence was never submitted to the jury at all. *However, it is respectfully submitted, the same principle which prevents a court from setting aside a jury verdict in Federal Employers' Liability cases should also operate to prevent a trial court from taking such a case away from the jury to begin with.* Otherwise, the right to a jury trial, upheld in the Bailey and Lavender cases would be sheer mockery, and a trial court disposed to prevent jury determination of an issue could circumvent these two cases by the expedient of directing a verdict. In short, petitioner prays the Supreme Court to make clear that the Bailey and Lavender cases operate to prevent not only the setting aside of a jury verdict but also the direction of a verdict against the plaintiff.

So far, it has been contended in this brief that the railroad owed an affirmative duty to the deceased to apprise him of the fact that this train would not stop. But more is involved in this case than mere *omission* to warn an employee of an unexpected danger. Even assuming, pro arguendo, that no duty to give such warning existed, the deceased in this case was *affirmatively* misled by conduct of the defendant into the belief that it was safe to cross the tracks where and when he did. He was actively lulled into a false sense of security by a whole series of circumstances within the exclusive control of defendant, all pointing unequivocally to a representation of safety which in fact was non-existent. Irrespective of any normal duty to give warning and of the defendant's privilege to operate its trains when and how it pleases, surely it will not be countenanced that the railroad, with callous indifference to resulting risks, create a deceptive appearance of safety upon which its employees rely with fatal consequences. Compare Gill v. Middleton, 105 Mass. 477 (1870). See Restatement of Torts, Sec. 311.

## CONCLUSION.

It is submitted that the authorities cited, supra, especially the Bailey and Lavender cases clearly demonstrate that the lower court was in error in taking this case from the jury. These pronouncements of the Supreme Court are meaningless unless they be regarded as definitely delimiting a trial judge's power to prevent the plaintiff from taking an issue of negligence to the jury, so long as there is *a* proper evidentiary basis. Plaintiff earnestly contends that the evidence reasonably demonstrates that decedent lost his life because of reasonable reliance upon appearances created by defendant which belied the unexpected danger which overtook him. That a jury, might justifiably so conclude is established by the trial court's own admission (109a, 110a):

> "I think this is a very close case whether or not it ought to go to the jury. It is a very unfortunate accident and I think everybody regrets it, not only the plaintiff and her family. * * * There were some inferences, but under the record I can find no negligence. * * *"

Therefore, plaintiff requests that certiorari be granted.

Respectfully submitted,

JOHN H. HOFFMAN,
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